

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

(Corrected Copy)

76-2117

Filed by
David Rapoport

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA *et al.*
THERESA SIMMONS,

Petitioner-Appellant.

Against

FRANCES CLEMENTE, Superintendent, Bedford Hills
Correctional Facility, Bedford Hills, N. Y.,

Appellee.

Appeal from the Denial of a Writ of Habeas Corpus
by the United States District Court for the
Southern District of New York

BRIEF FOR THE APPELLEE

ROBERT M. MORSETHAU

District Attorney,

New York County

Attorney for Appellee

155 Leonard Street

New York, New York 10013

(212) 732-7300

PETER L. ZIMBOTH

DAVID RAPAPORT

Assistant District Attorneys

Of Counsel

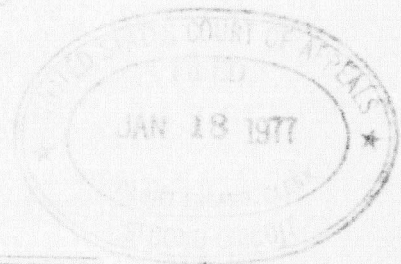


TABLE OF CONTENTS

	PAGE
Questions Presented.....	1
Introduction	2
Statement Of Facts.....	4
Background of Peggy Barbour.....	4
The Evening Preceding The Murder of Martin Seiler	4
The Murder of Martin Seiler.....	6
The Events At Harlem Hospital Leading To The Arrest of Simmons.....	8
The Police Investigation.....	11
The Proceedings Prior To Trial	13
The Trial.....	16
The Proceedings Subsequent To Trial.....	18
Point I - Simmons is precluded from obtaining federal habeas corpus relief by the doctrine of <u>Stone v. Powell</u> since the State of New York has provided an opportunity for full and fair litigation of her claim.....	20
Point II - The testimony of Barbour was not the "fruit of the poisonous tree" because (A) the arrest and interrogation of Simmons were proper; (B) the police would have discovered the identity of Barbour independently of Simmons' interrogation; and (C) the testimony of Barbour was an act of free will sufficient to purge the alleged primary taint.....	26
A. The Arrest And Interrogation Of Simmons Were Proper.....	26

B. The Police Would Have Discovered The Identity Of Peggy Barbour Independently Of Simmons' Statements	37
C. The Testimony Of Peggy Barbour Was An Inde- pendent Act Of Free Will Sufficient To Purge The Alleged Primary Taint	39
Conclusion	44

TABLE OF CASES

	PAGE
<u>Brown v. Illinois</u> , 422 U.S. 590 (1975)	28, 29
<u>Francis v. Henderson</u> , 96 S. Ct. 1708 (1976).....	20
<u>Harris v. New York</u> , 401 U.S. 222 (1971).....	35
<u>Johnson v. New Jersey</u> , 384 U.S. 719 (1966).....	13, 32
<u>Michigan v. Tucker</u> , 417 U.S. 433 (1974).....	32, 33 34, 35
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966).....	2, 12 13, 16 17, 32
<u>Morales v. New York</u> , 396 U.S. 102 (1969)	28, 29
<u>People v. Morales</u> , 22 N.Y.2d 55 (1968).....	26, 28
<u>People v. Morales</u> , 52 A.D.2d 818 (1st Dept. 1976)..	28
<u>Smith v. United States</u> , 324 F.2d 879 (D.C. Cir. (1963)).....	39
<u>Stone v. Powell</u> , 96 S. Ct. 3037 (1976)	3, 20 22, 23 24, 25 37
<u>United States of America ex rel. Conroy v. Bombard, S.D.N.Y., Slip Opinion, No. 76 Civ. 2329-CSH, November 24, 1976</u>	23, 24
<u>United States v. Ceccolini</u> , 542 F.2d 136 (2nd Cir. 1976)	3, 37, 41
<u>United States v. Falley</u> , 489 F.2d 33 (2nd Cir. 1973).	37
<u>United States v. Glover</u> , 372 F.2d 43 (2nd Cir. 1967).	26, 27
<u>United States v. Hoffman</u> , 385 F.2d 501 (7th Cir. 1967)	40

	PAGE
<u>United States v. Karathanos</u> , 531 F.2d 26 (2nd Cir. 1976)	41, 42
<u>United States v. Middleton</u> , 344 F.2d 78 (2nd Cir. 1965)	26, 27
<u>United States v. Vita</u> , 294 F.2d 524 (2nd Cir. 1961)..	26, 27 30
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1963)	2, 33 39

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
-----x

UNITED STATES OF AMERICA ex rel. :
THERESA SIMMONS, :
Petitioner-Appellant, :
-against- : Docket No. 76-2117
FRANCES CLEMENTE, Superintendent, :
Bedford Hills Correctional Facility, :
Bedford Hills, N. Y. :
Respondent-Appellee. :
-----x

BRIEF FOR APPELLEE

Questions Presented

1. Whether appellant is barred from obtaining federal habeas corpus review of her state court conviction by the recent decision of Stone v. Powell, 96 S. Ct. 3037 (1976).
2. Whether the District Court was correct in deciding that appellant's "fruit of the poisonous tree" argument was without merit.

Introduction

In the early morning hours of January 13, 1966, petitioner Theresa Simmons shot and killed 79-year-old taxi driver Martin Seiler as she attempted to rob him. She was accompanied during this incident by Peggy Barbour. Within a matter of hours, the police arrested Simmons, and interrogated her without giving her the warnings subsequently required by Miranda v. Arizona, 384 U.S. 436 (1966). *

During the interrogation, Simmons disclosed the identity of Barbour, who was subsequently arrested. Both Simmons and Barbour were indicted for murder. On September 19, 1966, Barbour pleaded guilty to manslaughter in the second degree. Simmons was tried for murder in Supreme Court, New York County from January 3 to January 25, 1967. Barbour testified for the prosecution, without objection by Simmons. Simmons was convicted of murder, and sentenced to prison for life. Her appeal was denied.

In 1973, Simmons sought post-conviction relief in Supreme Court, New York County on the grounds that she had been unlawfully arrested, and unlawfully interrogated, and that the testimony of Barbour was the "fruit of the poisonous tree." Wong Sun v. United States, 371, U.S. 471 (1963). This claim was considered and rejected by the Honorable Irwin D. Davidson, whose decision was affirmed on appeal.

*Miranda v. Arizona was decided on June 13, 1966.

In 1976, Simmons brought the instant petition for habeas corpus in the United States District Court for the Southern District of New York, raising the same "fruit of the poisonous tree" argument that she had made unsuccessfully to Justice Davidson and the Appellate Division of the New York Supreme Court. Her petition was denied on the merits by the Honorable John M. Cannella. Petitioner has appealed from that decision.

It is the position of the appellee that this Court should not reach the merits of Simmons' "fruit of the poisonous tree" argument because New York State "has provided [her] an opportunity for full and fair litigation" of her claim, both at her trial and initial appeal, and in post-conviction proceedings. Stone v. Powell, 96 S. Ct. 3037, 3052 (1976).

Should this Court reach the merits of Simmons' claim, appellee will argue that her arrest was lawful and her interrogation proper. If this Court should decide that the arrest was unlawful or the interrogation improper, appellee will rely upon two exceptions to the general rule that "fruit of the poisonous tree" testimony is inadmissible: (1) Independent investigation by the police would have led to the identity of Peggy Barbour; (2) The testimony of Peggy Barbour was an act of free will sufficient to purge the primary taint. See United States v. Ceccolini, 542 F.2d 136, 140 (2nd Cir. 1976).

STATEMENT OF FACTS*

Background of Peggy Barbour

Peggy Barbour separated from her husband in 1963 (492-93, 497), and thereafter began living with women (497). In 1964, she began using heroin (497-98, 608) and had committed acts of prostitution to obtain money for drugs. However, she had a job as a counter girl, waitress and cashier in a private dining room maintained by McCall's Magazine for its employees (495, 606).

The Evening Preceding The Murder of Martin Seiler

On January 12, 1966, Peggy Barbour resided at 20 West 131st Street, in Manhattan, together with Portia Brooks (498). Barbour and Brooks had lived together on terms of intimacy since 1964. Barbour arrived home at 5:30 or 6:00 p.m., accompanied by a minister who had given her a lift to work in his car, and found her apartment filled with people (504), some of whom she did not know (611-13). She was in need of a fix, and not feeling well (573-75, 580-83). She went to bed, and dozed off and on (581-82).

*Simmons testified at her trial, and denied the principal evidence against her. From the verdict of guilty, it is clear that the jury did not believe Simmons' version of the incident.

Around 8:30 or 9:00 p.m., Theresa Simmons arrived in the apartment (498, 500-03, 619-21, 623-24). Simmons came up to the bed where Peggy Barbour was lying and "snuggled her head down in [Barbour's] face to say hello" (645). Simmons, who admitted to being a lesbian (1250), had known Barbour, on and off, for a few years (1171), and had visited her apartment on three or four occasions (1171-72). She was also acquainted with Portia Brooks (1174).

During the evening, Barbour saw Simmons holding a gun (630, 501, 504, 629) and conversing with a man named Mike, whom Barbour knew (503). Mike was asking Simmons to sell him the gun (501-03). Both Portia Brooks and Phyllis Jones observed Simmons banging on the gun, and hammering it (897-98, 1137-38, 1140-42, 916-18, 963-65, 979-80). There were approximately ten other people in the apartment (504, 630-34); people were in and out all evening (504, 634-35). Everyone wanted to know if the gun was loaded (918-19). Simmons "looked and grinned and said 'you think I'd be carrying an empty gun?'" (919, 963). There was talk in the apartment about robbing cabs (507). Simmons was asking people to go with her to get money by robbing a cab (510-12). At approximately 4:30 a.m., Simmons and Barbour left the apartment seeking to obtain money for drugs (505-06, 658).

The Murder of Martin Seiler

Simmons and Barbour hailed a taxi driven by Martin Seiler (513). Simmons sat behind the driver, and Barbour sat to the right (665). Simmons gave the driver her home address (513, 662, 686). When the taxi got within a few blocks of her home, Simmons told Seiler to stop.

Simmons, who was seated behind Seiler, then grabbed him around the neck and placed the gun to his head. Barbour removed the ignition keys (516, 677-79). Seiler then struggled with Simmons, who shot him in the neck (515-16). The bullet traveled through Seiler's neck, piercing his jugular vein and killing him (76-79). The bullet then entered Simmons' left arm, which was wrapped around Seiler's neck. The bullet fractured Simmons' arm and lodged in it (993-96, 1038-39). Simmons and Barbour panicked and fled the scene without taking any money from Seiler (516).

The two women ran to Simmons' apartment a block away, where they encountered Simmons' sister Constance and brother Nathaniel (518-19). Neither Constance nor Nathaniel had ever seen Barbour until the early morning of January 13th (519).

Nathaniel testified at trial that he recognized Barbour's picture in the newspapers after the murder (767-68).

Simmons was "bleeding bad." Twice Nathaniel asked Simmons what had happened. She told him only that she had an accident, and not to worry about it (764-66). Constance, Nathaniel and Barbour attempted to treat Simmons' wounded arm, but were unable to stop the bleeding (519-21). Nathaniel bandaged the arm with a tie and a can opener. He advised Constance to take Simmons to the hospital, that he could not go because he had to go to work (520). All of this happened fairly quickly (521).

Simmons, Barbour and Constance left the apartment, intending to take Simmons to the hospital. Before leaving the building, Constance returned to the apartment and hid the gun (523-25, 683-84, 690-93). Barbour threw the ignition keys from the taxi on the roof of the building (539, 679-80).

The three women then took a cab to Harlem Hospital (526). Simmons and Constance got out at the hospital, while Barbour took the cab home (526, 535-36, 685). When Barbour got home, about 4:30 or 5:00 a.m., she had a conversation with Portia Brooks (902).

The Events At Harlem Hospital Leading To The Arrest Of Simmons

Shortly after the shooting, area residents notified the police, who investigated the scene of the crime. At approximately 5:00 a.m., detectives commenced a homicide investigation. The police accompanied the body of Martin Seiler to Harlem Hospital where it was examined by Dr. Gladstone Hodge. Dr. Hodge determined that the deceased had been shot through the neck by a small caliber bullet (984-85, 990). There was a wound of entrance on the right side of the neck and a wound of exit on the left side.

Soon after examining the body of Seiler, Dr. Hodge treated Simmons. She claimed that she had caught her arm in a door, but an examination of her left arm by Dr. Hodge revealed a gunshot wound of the same size as the wound in Martin Seiler's neck; Dr. Hodge determined that a .22 caliber bullet had caused both wounds (987-91). Dr. Hodge told Simmons that she had suffered a gunshot wound. She then admitted to him that she had been shot (1034). Dr. Hodge dressed the wound, and gave Simmons tetanus toxide to prevent lockjaw (991).

At 5:10 a.m., after he had finished examining Simmons, Dr. Hodge reported to Patrolman William A. Leslie, the officer assigned to the patrol post in Harlem Hospital (180, 320, 340, 366, 1046-47). Dr. Hodge told Leslie: "Here is a case; they tell me they got the arm caught in a door, and I am looking at a gunshot wound" (1016). Since the detectives were right in the other room with the deceased, Dr. Hodge told Leslie that "he

ought to go get the detectives and see what it was" (1047), and that Simmons' wound was just about the same size as Seiler's (1045-46).

After speaking with Dr. Hodge, Officer Leslie saw Simmons, who was in the female treatment room of the emergency ward (180-81, 320-21, 324, 364, 370-71). Leslie asked Simmons how she got her injury,* and she replied: "I caught it in a door." Leslie asked her what door, at what location, and she replied, "downtown" (324). When he asked "where downtown," she did not answer (325). Officer Leslie said, "The doctor informs me that this is a gunshot wound"; she replied, "No, it isn't" (326, 337-39). Officer Leslie then left Simmons and notified the police precinct (324).

Approximately 10 minutes after he had spoken with Simmons, Officer Leslie talked to Detective Leo Kitchman who, together with Sergeant Martin Stanise, had come to Harlem Hospital to view the body of Martin Seiler in connection with the homicide investigation (704-06, 731-32). Officer Leslie was not satisfied with the answers Simmons had given him (220), and questioned her again in Kitchman's presence. He again asked her how and where she had been injured; he received the same answers as

*A Huntley hearing was conducted, out of the presence of the jury (195-265), to determine whether the statements Simmons made to the police at Harlem Hospital were admissible. At the conclusion of this hearing the trial court found that Simmons was not in custody on either occasion when Officer Leslie questioned her about the injury to her arm (266-73).

before (325-26, 337, 706). After this exchange, Simmons went upstairs to the X-ray room, accompanied by Constance (326). Following this second conversation, Officer Leslie determined that Simmons was a suspect in the murder of Martin Seiler (229).

Sergeant Martin Stanise, who learned of Simmons' earlier conversation with Leslie and Kitchman, went to the X-ray room on the fourth floor, where he saw Simmons and her sister, Constance (733-34, 738). Stanise asked Simmons, who had a bandage on her left hand and wrist, what had happened to her. She replied: "I got my arm caught in a door but the doctor downstairs said that's a gunshot wound" (733-39). Sergeant Stanise brought Simmons downstairs and had Dr. Hodge remove the bandage from her wrist (739). He then observed the wound (739, 741-43), and noted that "It was a similar wound, your Honor. It looked like a similar caliber [to the bullet which had killed Martin Seiler]" (741-42). At about 5:30 a.m., Sergeant Stanise and Detective Kitchman took Simmons, accompanied by Constance, to the station house (327, 706, 743). At 6:00 a.m., Officer Leslie, who had remained at his post in Harlem Hospital, noted in his memo book that Simmons had a "possible connection with homicide of cab driver" (214).

The Police Investigation

Detective James Scaringe, a ballistics expert, who had examined the body of Martin Seiler and observed his wounds (801-04), saw Simmons at the station house and saw holes in the left sleeves of both her jacket and her shirt which could have been caused by a .22 caliber bullet (806). The police quickly learned that Simmons had given them a false name and address (257-58).

Simmons' brother Nathaniel arrived at the station house soon afterwards. The police asked Nathaniel what he knew about Simmons' injury. He told them of Simmons' coming home bleeding a few hours previously, and the other events that had transpired in the apartment, including the fact that there was another girl with Simmons and Constance (382-85). Detectives Kitchman and Regan spoke to Nathaniel and he consented to a search of his apartment, where he resided with his sisters Theresa and Constance. There was testimony that Nathaniel was "very cooperative" with the police (297).*

Kitchman searched the apartment at about 7 or 8 a. m. on the morning of the murder and discovered the .22 caliber revolver in Theresa's room (386-89, 423, 707-13). The gun contained one live cartridge and one spent shell, had been fired within the past 24 hours (811-13, 818-20, 832), and could have caused the

*After a hearing, the trial court determined that the search was consensual (486), and that determination is not contested by the instant petition.

wound in Martin Seiler's neck as well as the bullet holes found in petitioner's shirt and jacket sleeves (876-77).

At the station house, Simmons was questioned by detectives about the shooting. She was not given the warnings subsequently required by Miranda v. Arizona. She continued to insist that her arm had been caught in a door (1263-64). She apparently did not admit her involvement in the crime until sometime before noon, when she learned of the discovery of the gun (1263-67). She told the detectives that she had been accompanied during the crime by a friend named Peggy.

Assistant District Attorney Thomas Hughes then spoke to Simmons and, at about 3:30 p. m., he took a statement from her. (People's Exhibit 34 for Identification, a copy of which is annexed hereto as Appellee's Exhibit A).

Simmons told Hughes that she had shot the "cab driver" who had been "shot on 141st Street" and that she had been accompanied during the crime by her friend Peggy (Exhibit A, pp. 2, 3, 5, 7, 9). She said that she did not know Peggy's last name (Exhibit A, p. 4). *

The next day, January 14, Barbour heard that Simmons had been arrested and that Martin Seiler was dead. Barbour

*The circumstances of Simmons' interrogation, and the limited purpose for which part of her confession was offered at trial will be set forth more fully in a later section of the statement of facts.

was on her way down to the police station when she was arrested by the detectives (Statement of Peggy Barbour, Appellee's Exhibit B, p. 22). Barbour confessed her role in the crime to Assistant District Attorney Hughes, after Hughes advised her that she had a right to remain silent and that anything she said could be used against her (Exhibit B).

No fingerprints were found in the cab (111), and no ballistics tests were possible because no bullet was ever found. Sergeant Stanise immediately searched for "Mike", "Harold", and the other man who had been present in the Barbour apartment during the hours preceding the murder, but could not locate them (881-83). He did, however, locate some of the persons who had been present (885), including Portia Brooks (903). On January 14, police officers had gone to the apartment at 20 West 131 Street and asked Portia Brooks where Barbour was (902-03). Phyllis Jones later testified at the trial that Portia Brooks had told the police who was at the apartment that night (924).

The Proceedings Prior To Trial

Simmons and Barbour were indicted for first degree murder. On June 13, 1966, the United States Supreme Court announced its decision in Miranda v. Arizona, 384 U.S. 436 (1966). The decision was made applicable to trials commenced after June 13, 1966 by Johnson v. New Jersey, 384 U.S. 719 (1966).

Thus, the prosecution could not use either the confession of Simmons or that of Barbour as part of its case in chief. Assistant District Attorney William Loguen, who was assigned to try the case, acknowledged that the confessions of Simmons and Barbour had not been preceded by warnings in full compliance with the new doctrine, and it was agreed that no effort would be made to introduce those statements as evidence in chief.

Barbour was represented by two court appointed attorneys, Alfred Rosner and Herman Goldberg. Plea bargaining between the prosecution and Barbour began in May 1966 and ended on September 19, 1966 when she pleaded guilty to manslaughter in the second degree.

On June 21, 1966 Assistant District Attorney Loguen offered Attorney Rosner a plea of manslaughter in the first degree. Rosner countered, requesting manslaughter in the second degree (1288). The following day, June 22, Rosner visited Barbour and told her he thought he could get a plea to second degree manslaughter. At that time, there was no request by Loguen that Barbour testify against Simmons (1289).

On August 3, Rosner and Loguen came to an agreement on manslaughter in the second degree (1289). The following day Rosner discussed the matter with Barbour, who decided to accept the plea (1290). The plea was not contingent upon Barbour's testifying against Simmons (1290).

Barbour was due to plead guilty on September 8th. Loguen requested that the case go over until September 19th so that he could discuss the Simmons case with one of her attorneys, Michael Drenzo (1290).

A day or so before September 19, Loguen asked Rosner if Barbour would agree to testify against Simmons (1290). Rosner conveyed this request to Barbour. According to Rosner,

And then she asked me, "Well, do I have to be a witness? I wouldn't want to be a witness." I said, "It's my impression that Mr. Loguen, because he can't get a plea from the co-defendant, will not give you the plea of manslaughter in the second degree unless you do agree. So, she agreed, and then I went back to court (1291-92).

Barbour was asked on cross-examination by counsel for Simmons if Rosner had told her she would save herself a lot of years by pleading. She answered:

No; he didn't exactly say that, because it was up to me, whether I wanted to take the plea or not, and he left it up to me (551).

She was asked the question again. She answered:

Well, exactly what he said I don't know, but I told him when I found out I had a chance to get the plea, that sounded better than 20 to life, or natural life (551-52).

Barbour pleaded guilty to manslaughter in the second degree on September 19, 1966. Her sentencing was deferred until after Simmons' trial. She testified that no promise was made to her with regard to her sentence (494), although she expected consideration for testifying against Simmons (697-98).

The Trial

Simmons went to trial in Supreme Court, New York County, before Justice Irwin D. Davidson and a jury, in January of 1967. She was represented by three attorneys; Michael Drenzo, Harry Zweibel and Walter Pick (4-5).

On January 10, 1967, the prosecution called Officer Leslie. Michael Drenzo, lead counsel for Simmons, objected to testimony of statements Simmons had made to the police at Harlem Hospital. It was Drenzo's theory that Simmons was in custody at the time, and any statements she made to the police were inadmissible under Miranda v. Arizona. (181 et seq.). Justice Davidson held a Huntley hearing out of the presence of the jury to determine the admissibility of these statements (183-84). Justice Davidson ruled that Simmons had not been in custody at the time she made the statements to the police at the hospital, and the trial proceeded.

Peggy Barbour testified as a witness for the prosecution without any objection by the defense. After the prosecution rested, Simmons testified in her own defense. As the prosecution was about to commence cross-examination, Drenzo objected to the prosecution's proposed use of the statements Simmons had given to Assistant District Attorney Hughes for purposes of impeachment. Justice Davidson noted that under Miranda, the statements could not be used to prove guilt, during the prosecution's case in chief, but could be used to prove prior inconsistent statements if the defendant took the stand (1200).

There was an extensive bench conference concerning the applicability of Miranda v. Arizona to the case on trial (1191-1232). Durenzo then apparently took the position that regardless of Miranda, if Simmons' statements had been coerced, they should not be admitted for any purpose (1209).

Justice Davidson then questioned Simmons, out of the presence of the jury, regarding the circumstances of her interrogation. She testified that she had not been beaten or threatened (1227), had not asked for nor been given anything to eat or drink (1229), and was taken back to Harlem Hospital for another X-ray which took an hour and a half in the middle of the questioning (1230). Justice Davidson found that Simmons' statements were not obtained as a result of coercion.

On January 25, 1967, the jury found Simmons guilty of murder in the first degree as a felony murder (1496). Before adjourning, Justice Davidson made the following comment regarding defense counsel:

[I] do want to say something, for the record, with regard to counsel, Mr. Durenzo, Mr. Zweibel, and certainly Mr. Pick. I think that this defendant was very, very ably represented by very competent counsel, who took a very, very keen interest in the problem entrusted to them, and I feel that certainly their efforts here were in the best traditions of the legal profession (1502).

On February 16, 1967, Justice Davidson sentenced Simmons to prison for the term of her natural life (1521).

The Proceedings Subsequent To Trial

Simmons appealed her conviction. She was represented by Michael Direnzo, the attorney who had been her lead counsel at trial. He argued on appeal that the gun introduced at trial was obtained as a result of an illegal search of her brother's apartment; that she was improperly cross-examined about an incriminating statement that she made to Assistant District Attorney Hughes; that a three-day gap between the direct and cross-examination of a prosecution witness deprived her of a fair trial; and that the trial court erred by refusing to poll the jurors about whether they were influenced by news media coverage of the killing of another taxi driver.

The Appellate Division of the New York Supreme Court affirmed the judgment without opinion on July 1, 1969. People v. Simmons, 32 A.D.2d 1029 (1st Dept. 1969). Leave to appeal to the New York Court of Appeals was not sought.

In May 1973, Simmons, represented by new counsel, moved in Supreme Court, New York County to vacate her conviction, claiming for the first time that the testimony of Peggy Barbour was obtained as a result of the exploitation of an illegal arrest and interrogation.

After reviewing the record, Justice Davidson denied "the instant application in the nature of a writ of error coram nobis" on September 19, 1973. Justice Davidson found that "the record supports [the] contentions" of the District Attorney that the

police investigation would have inevitably discovered the identity of Peggy Barbour, even absent the alleged illicit conduct. Justice Davidson also observed that New York Criminal Procedure Law §440.10(2) precluded Simmons from urging the "fruit of the poisonous tree" argument as a basis for vacating judgment when the facts relied upon were known to Simmons at the time of trial and could have been raised then or later on appeal. A copy of Justice Davidson's decision is appended hereto as Appellee's Exhibit C.

The decision of Justice Davidson was unanimously affirmed without opinion by the Appellate Division of the New York Supreme Court on October 29, 1974. People v. Simmons, 46 A.D.2d 743 (1974). Leave to appeal to the New York Court of Appeals was denied on December 12, 1974.

POINT I

SIMMONS IS PRECLUDED FROM OBTAINING FEDERAL HABEAS CORPUS RELIEF BY THE DOCTRINE OF STONE V. POWELL SINCE THE STATE OF NEW YORK HAS PROVIDED AN OPPORTUNITY FOR FULL AND FAIR LITIGATION OF HER CLAIM.

Simmons alleges that the trial testimony of Peggy Barbour should have been suppressed as the "fruit of the poisonous tree" because the police only learned of Barbour's identity as a result of an illegal arrest and interrogation of Simmons.

Although Simmons' failure to make timely objection to Barbour's trial testimony would normally have barred her from raising the issue on federal habeas corpus, Francis v. Henderson, 96 S. Ct. 1708 (1976), Simmons did ultimately seek state post-conviction relief on the ground that Barbour's testimony was the "fruit of the poisonous tree." Because the state trial and appellate courts considered (and rejected) Simmons' claim on the merits,* Simmons is precluded by Stone v. Powell, 96 S. Ct. 3037 (1976) from re-litigating this issue on federal habeas corpus.

Stone v. Powell held that where the state has given a defendant an opportunity for full and fair litigation of his Fourth Amendment claim, he is barred from seeking relief on that ground through federal habeas corpus. Simmons is apparently making

*This point was expressly conceded by appellant in her brief below, at page 24.

both a Fourth Amendment and a Fifth Amendment claim; that her arrest was unlawful because the police lacked probable cause, and her interrogation invalid because she was not given the Miranda warnings. While her brief stresses her Fourth Amendment claim* (and understandably so, in view of Michigan v. Tucker, 417 U.S. 433 (1974)), she sees a nexus between the two claims. Thus she says, at page 15 of her brief, that the interrogation "was clearly tainted by the illegality of appellant's arrest." To the extent Simmons' Fifth Amendment claim is subsumed within her Fourth Amendment claim, both are governed by Stone v. Powell. To the extent her Fifth Amendment claim stands alone, it is defeated by the ruling in Michigan v. Tucker, discussed infra, at Point II-A.

Stone v. Powell, supra, held that:

[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial. (3052)

Simmons reads Stone v. Powell narrowly, in Point III of her brief, to hold that only where a defendant has actually litigated a Fourth Amendment issue in state court, is he precluded from later re-litigating the matter on federal habeas corpus. Appellee reads Stone v. Powell more broadly to hold that so long as the state has provided an opportunity for litigation of the Fourth

*See Point III of appellant's brief discussing Stone v. Powell.

Amendment claim, then a state prisoner cannot raise the Fourth Amendment issue on federal habeas, regardless of whether or not he actually took advantage of the opportunity and litigated the matter. However, the court need not reach this issue because Simmons has, in fact, already litigated her claim in the courts of New York State.

In May 1973, Simmons sought state habeas corpus relief in Supreme Court, New York County, alleging that the testimony of Peggy Barbour should have been suppressed as the "fruit of the poisonous tree." Justice Davidson reviewed the record,* and denied the petition, finding that the record supported the argument of the District Attorney that the police investigation would have inevitably discovered the identity of Peggy Barbour, even absent the alleged illicit conduct. Although he observed that New York Criminal Procedure Law §440.10(2) would preclude Simmons from seeking post-conviction relief on facts known to her at the time of trial, he nevertheless reached the merits of Simmons' habeas petition, and determined them adversely to her. His decision was affirmed by the Appellate Division of the New York Supreme Court on October 29, 1974. People v. Simmons, 46 A.D.2d 743 (1974). Leave to appeal to the New York Court of Appeals was

*The record which was reviewed by Justice Davidson in 1973, the Appellate Division, First Department in 1974, and Judge Cannella in 1976 consists of the "Record on Appeal" to the Appellate Division, First Department whereby Simmons appealed her 1967 murder conviction. This "Record on Appeal," which contains the trial minutes, is also before this Court by stipulation of counsel.

denied on December 12, 1974. Thus, at least "two or more tiers of state courts" have already considered and rejected Simmons' "fruit of the poisonous tree" argument. See Stone v. Powell, supra at 3050.

The only conceivable argument Simmons can make in an attempt to avoid the clear mandate of Stone v. Powell is that she was not given "an opportunity for full and fair litigation" of her claim because Justice Davidson did not hear live testimony in 1973 on her petition for post-conviction relief.

However, Justice Davidson had before him over 1500 pages of trial minutes, together with affidavits from Theresa Simmons and Attorney Alfred Rosner, which had been appended to the petition. Furthermore, Justice Davidson had himself presided over Simmons' 1967 trial, and was fully familiar with the case. He had heard all the testimony and observed the demeanor of the witnesses. A large portion of the testimony and argument before Justice Davidson in 1967 related to the "fruit of the poisonous tree" issue, although it was not so denominated at the time. Thus, the circumstances of Simmons' arrest and interrogation were explored in extensive detail, and there was sufficient testimony concerning the police investigation and Peggy Barbour's decision to testify from which it was possible to determine the "fruit of the poisonous tree" claim. (This evidence will be explored more fully in Point II of the Brief).

In reviewing Simmons' 1973 petition for habeas corpus, Justice Davidson was faced with a choice. He could either rely upon the trial testimony, given when events were still fresh in the minds of the witnesses, together with the affidavits Simmons had appended to her petition, or hold an evidentiary hearing more than six years after the fact. It was certainly within his discretion to choose either of these methods of finding the facts. Each method had both advantages and disadvantages. If he heard live testimony in 1973, he would run the risk that certain witnesses were unavailable, or, if available, could not remember clearly events which had happened six years previously. On the other hand, if he relied on the trial minutes, he risked deciding the matter on the testimony of witnesses who were not focusing on the precise issue raised by the habeas corpus petition. Of course, relying on the trial minutes carried with it the assurance that none of the witnesses were tempted to color their testimony to support the legal theory of one side or the other. In any event, it was up to Justice Davidson, as the finder of fact, to make these admittedly difficult determinations.

The only requirement of Stone v. Powell is that the state court provide "a reasoned method of inquiry into relevant questions of fact and law ... [a] forum concededly unbiased using procedures concededly rational." United States of America ex rel Conroy v. Bombard, S.D.N.Y. Slip Opinion, No.76 Civ. 2329-CSH, November 24, 1976, at 24. (quoting an article written by

Professor Bator entitled Finality in Criminal Law and Federal Habeas Corpus Review for State Prisoners, 76 Harv. L. Rev. 441 (1963), which was cited twice by the Court in Stone v. Powell, supra at 3042 n. 7, 3052 n. 35). Professor Bator presents, as examples of forums failing this test, instances where the judge was bribed or the process contained no opportunity to raise the claims.

As Judge Haight observed in Conroy, supra at 23:

A diligent and thoughtful reading of Powell leads to the conclusion that the Court intended that there are to be few situations where a district court should find that a petitioner was denied an opportunity for a full and fair hearing in the state court.

Surely Stone v. Powell did not mean to transform every case where a state prisoner has litigated his Fourth Amendment claim in state court into a wide-ranging debate among federal judges concerning the particular fact-finding techniques which the state judge chose to employ.

Whether or not this Court would have adjudicated Simmons' claims in precisely the manner chosen by Judge Davidson, his approach was certainly a rational choice among alternatives which each presented both advantages and disadvantages. As such, his consideration of Simmons' claim provided her with the opportunity for full and fair litigation of her claim required by Stone v. Powell.

In this context, it is significant to note the admonition of the Supreme Court in Stone v. Powell, supra at 3051, fn. 35:

years (11/1) and had visited her apartment on three or four times.
[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states . . . The argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search and seizure claims, since they are dealt with on a daily basis by trial level judges in both systems....

Simmons' claim has been considered and rejected, after a review of the extensive record, and the affidavits Simmons chose to submit, by the trial and appellate courts of New York State. It would be contrary to the holding of Stone v. Powell for this Court to permit Simmons to re-litigate her claim in federal court. Accordingly, the petition for habeas corpus should be denied.

POINT II

THE TESTIMONY OF BARBOUR WAS NOT THE "FRUIT OF THE POISONOUS TREE" BECAUSE (A) THE ARREST AND INTERROGATION OF SIMMONS WERE PROPER; (B) THE POLICE WOULD HAVE DISCOVERED THE IDENTITY OF BARBOUR INDEPENDENTLY OF SIMMONS' INTERROGATION; AND (C) THE TESTIMONY OF BARBOUR WAS AN ACT OF FREE WILL SUFFICIENT TO PURGE THE ALLEGED PRIMARY TAINT.

A. The Arrest And Interrogation Of Simmons Were Proper.

The police investigating the murder of Martin Seiler acted properly and in accordance with existing law in detaining Simmons for further questioning following her interrogation at Harlem Hospital. While it is a close question whether the police, at that time, had probable cause to believe that Simmons herself had murdered Martin Seiler, they certainly had reasonable grounds to believe that she was involved to some extent in the crime. The information in their possession at Harlem Hospital justified their detaining Simmons for further questioning. United States v. Middleton, 344 F.2d 78, 83 (2nd Cir. 1965); United States v. Vita, 294 F.2d 524, 533 (2nd Cir. 1961); United States v. Glover, 372 F.2d 43, 46 fn. 4 (2nd Cir. 1967); People v. Morales, 22N.Y.2d 55 (1968).

It is well-established in the Second Circuit that the police may detain suspects for a reasonable period of time so long as their purpose is investigatory, and not merely to keep the suspect in custody indefinitely until he confesses.

Simmons statements were inadmissible against Barbour. The po
In holding that a four or five hour period was not unreasonable, Chief Judge Lumbard said, in United States v. Vita, 294 F.2d 524, 530, 533 (2nd Cir. 1961):

This prerogative of police officers to detain persons for questioning is not only necessary in order to enable the authorities to apprehend, arrest and charge those who are implicated; it also protects those who are readily able to exculpate themselves from being arrested and having formal charges made against them before their explanations are considered . . . If the purpose is investigatory, and not simply to keep the accused in custody until he confesses, if the police have good reason to believe that the suspect must be questioned further in order to determine whether he or any other person ought to be arrested, detention for a reasonable period of time is permissible and any confession obtained during it is admissible.

United States v. Vita, supra was cited with approval by Judge (now Chief Judge) Kaufman in United States v. Middleton, 344 F.2d 78, 83 (2nd Cir. 1965):

Nor do we question the power of the police, under proper circumstances and while investigating a crime 'to detain suspects for reasonable periods of time in order to question them, check their stories, and to run down leads which either confirm or contradict those stories.'

See also United States v. Glover, 372 F.2d 43, 46 at fn. 4 (2nd Cir. 1967).

The New York Court of Appeals holds the same view, recognizing in People v. Morales, * 22 N.Y.2d 55, 60 (1968):

[t]he common law authority of law enforcement officials to detain persons for investigation as a reasonable and necessary exercise of the police power for the prevention of crime and the protection of public order.

Simmons cites Brown v. Illinois, 422 U.S. 590 (1975) for the proposition that an investigatory arrest is impermissible. The case stands for no such broad proposition. The police had obtained Brown's name as an acquaintance of the deceased, not as a suspect in the murder. They broke into Brown's apartment and searched it without a warrant. The Court stated that:

The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright and confusion (605).

The Court stressed that:

The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged in their testimony that the purpose of their action was "for investigation" or "for questioning..." (605)

*People v. Morales, supra was appealed to the United States Supreme Court, which remanded the case for a fuller development of the record. Morales v. New York, 396 U.S. 102 (1969). On remand, Justice Gellinoff made findings of fact and conclusions of law, holding inter alia that the police detention of Morales was proper. His opinion was affirmed by the Appellate Division, First Department on May 25, 1976. People v. Morales, 52 A.D. 2d 818 (1st Dept. 1976). The case is currently pending before the New York Court of Appeals.

they did not know that they would discover the identity of a witness. The detectives, without any reason to believe that Brown was criminally implicated in the murder, executed a flagrantly unlawful arrest. Their concession that the arrest was investigatory was cited by the Court merely as evidence that they knew they lacked probable cause to arrest Brown for the murder.

Brown v. Illinois, was primarily concerned with whether Miranda warnings could remove the taint of the unlawful arrest. The Court was clearly not addressing itself to the validity of investigatory arrests in general, particularly in light of its expressed desire in Morales v. New York, supra that this issue be presented to the Court after thorough development of the record.

The police who questioned Simmons at Harlem Hospital had evidence which indicated that she was either criminally involved in the murder of Martin Seiler or had important knowledge concerning the commission of the crime.

They knew that a taxi driver named Martin Seiler had been shot through the neck shortly before 5:00 a.m., by a .22 caliber bullet. They knew that the bullet had entered his neck from one side, and gone out the other. They knew that at approximately the same time, Simmons had been shot through the wrist by a .22 caliber bullet. The fact that both Seiler and Simmons were brought to Harlem Hospital suggests that the two shootings had occurred in approximately the same location. Simmons was clearly lying about the cause of her wound, claiming she had

caught her arm in a door. She continued to tell the police this absurd story, despite repeated questioning at the hospital.

It was clear from Simmons' behavior that she had been involved in a crime, and was attempting to conceal this information from the police. Simmons argues in her brief that "The fact that appellant had been shot would seem to lead much more reasonably to the conclusion that she was a victim of a crime, not a perpetrator." (pp. 11-12). This argument overlooks the fact that Simmons was lying to the police, denying that she had been shot. Who would be more likely to lie to the police about having been involved in a crime -- the victim, or the perpetrator? Simmons' evasive behavior, coupled with her wound, strongly suggested that she was criminally involved in the murder of Martin Seiler, whether as a principal or as an accomplice.* The police were, of course, aware that mere participation in the crime would subject Simmons to felony murder charges, even if she herself had not shot Seiler. Given these circumstances, the police would have been derelict in their duty if they had not brought Simmons to the stationhouse for further questioning, "to determine whether [s]he or any other person ought to be arrested," United States v. Vita, supra at 533.

It was apparent that the purpose of the police in bringing Simmons to the stationhouse was to investigate her story rather

*Simmons' own attorney stated, at a bench conference: "[T]his girl was a prime suspect and was on the target and was the subject of inquiry as a prospective defendant, if not the defendant, in this case, from the time she was in Harlem Hospital." (872).

than to keep her in custody until she confessed. This is demonstrated by the rapidity with which they interrogated Simmons, her sister Constance and brother Nathaniel, and by their diligence in following up the lead which Nathaniel provided.

The police very quickly learned that Simmons had given them a false name and address (257-58). Meanwhile, Detective Scaringe, a ballistics expert who had observed the wound in Martin Seiler's neck, examined Simmons' clothing and observed holes in Simmons' jacket and shirt sleeves which could have been caused by the same type of gun which had killed Seiler (802-06).

Once the police learned from Nathaniel that Simmons had come home bleeding at approximately 5:00 a.m., and had avoided Nathaniel's questions concerning what had happened to her, they requested and received his permission to search the apartment he shared with his sisters. They discovered a .22 caliber gun in the area of the apartment where Simmons slept. The gun had recently been fired, and contained shells that could have caused the wounds to both Seiler and Simmons.

Surely after finding the gun, the police had probable cause to arrest Simmons for the murder of Martin Seiler. It appears that Simmons confessed sometime before noon, after learning that the police had discovered the gun (1263-67). Her confession left no doubt whatsoever of her guilt.

On the basis of the facts known to the police at Harlem Hospital, and Simmons' highly suspicious behavior, the police were

justified in detaining her for further questioning, on the authority of the Second Circuit and New York cases cited above. Once Simmons was at the station, the police rapidly checked out her story and in the process uncovered additional incriminating evidence. Their activities were clearly investigatory, and Simmons has no valid objection to the manner in which she was apprehended.

The police at the stationhouse questioned Simmons without giving her the full Miranda warnings subsequently required by the Supreme Court. Simmons told the police that she had been accompanied during the crime by a friend named "Peggy." The police subsequently arrested Barbour, who testified against Simmons at trial. Simmons now argues that Barbour's testimony should have been suppressed because she was not given the Miranda warnings. Her argument is foreclosed by the case of Michigan v. Tucker, 417 U.S. 433 (1974).

Tucker was arrested for rape after his dog was found in the house of the victim. The police questioning, which occurred prior to Miranda, was preceded by warnings to Tucker that he had a right to remain silent and that anything he said could be held against him. He was then asked if he wanted an attorney. Tucker waived these rights and did not request an attorney. He told the police he had an alibi which could be confirmed by another person named Henderson. Henderson, however, refuted Tucker's alibi claim and provided evidence that incriminated Tucker in the rape.

Prior to trial, the Supreme Court's decisions in Miranda v. Arizona, supra and Johnson v. New Jersey, supra

were announced, and Tucker's statements were excluded because the police had failed to advise him of his right to be represented without cost by an attorney. No effort was made at trial to use Tucker's statements against him on the prosecution's direct case.

Before trial, Tucker attempted to exclude the testimony of Henderson, arguing that it was the fruit of his illegally obtained statement. His motion was denied. Henderson testified and Tucker was convicted. His conviction was affirmed on appeal in the state courts. Subsequently, in a federal habeas corpus petition, it was held that the testimony of Henderson was the "fruit" of the illegal questioning of Tucker, and should have been excluded.

The Supreme Court reversed. After noting that the state court had complied with the Miranda principle that Tucker's statements could not be used to prove his guilt at trial, the Court decided that the "fruit of the poisonous tree" doctrine enunciated in Wong Sun v. United States, supra, was not controlling in Tucker's case. This was so, the Court reasoned, because the police conduct did not "abridge [Tucker's] constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in Miranda to safeguard that privilege." Michigan v. Tucker, supra, at 445-46.

The Court then examined the possible reasons for imposing upon the State the sanction of excluding Henderson's testimony. The Court noted that the rationale underlying the "deterrent purpose of the exclusionary rule" lost much of its force "where the official action was pursued in complete good faith" (447). The

Court concluded:

[W]hatever deterrent effect on future police conduct the exclusion of [Tucker's] statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well (448).

The Court also examined Tucker's claim that he had been compelled to accuse himself and that the Government was required to make out its case without resort to the help of defendant himself. The Court held that the pressure exerted on Tucker was hardly comparable to that found in those cases where the court had granted relief.* Moreover, the evidence that the prosecution introduced was "the testimony of a third party who was subjected to no custodial pressures. There [was] plainly no reason to believe that Henderson's testimony [was] untrustworthy simply because [Tucker] was not advised of his right to appointed counsel." Michigan v. Tucker, supra, at 448-49.

Concluding that "the Government is not forbidden all resort to the defendant to make out its case", (450) the Court stated: "[w]e do not think that any single reason supporting exclusion of this witness' testimony, or all of them together are very persuasive" (450). By contrast, the Court observed, there was "a strong interest under any system of Justice of making available to the trier of fact all concededly relevant and trustworthy evidence" (450).

*Simmons' claim of coercion was rejected by Justice Davidson after an evidentiary hearing.

The Court also recalled its own holding in Harris v. New York, 401 U.S. 222, (1971) where it held that the doctrine enunciated in Miranda did not bar evidence inadmissibly obtained from an accused for all purposes, provided the evidence itself was trustworthy.

Applying the reasoning of Harris, and "balancing the interests involved", the Court held that Henderson's statements were admissible. "The arguable benefits from excluding such testimony by way of possibly deterring police conduct that might compel admissions" were, observed Mr. Justice White, in his concurring opinion at 461, "far outweighed by the advantages of having relevant and probative testimony... available at criminal trials to aid in the pursuit of truth."

Simmons, like Tucker, was advised that she had a right to remain silent and that her statements would be used against her (Exhibit A, 1). She was not advised of her right to counsel, nor did she request an attorney. Like Tucker, she was questioned before the Miranda decision. Simmons' statements, like those of Tucker, were not used affirmatively against her.

Neither the instant case nor Tucker involved any question of the trustworthiness of the witnesses whose testimony was admitted. Moreover, both Henderson in Tucker and Barbour in Simmons were subject to extensive cross-examination concerning both their substantive testimony and their possible motives for testifying. Michigan v. Tucker, supra, at 449. (539-686, 689-99).

The considerations balanced by the Court in Tucker are present here. At no point did Simmons request an attorney or assert her right to remain silent. There was no coercion of Simmons' statements. The police in both cases acted in good faith. The alleged constitutional violation did not in any way relate to the reliability of the witness whose testimony was admitted. Finally, the strong interest in allowing the finders of fact to have reliable, probative evidence was present in both cases. This Court should follow the reasoning of Michigan v. Tucker, and refuse to suppress the testimony of Barbour.

Simmons claims that Tucker is inapplicable because she was arrested without probable cause and in violation of her Fourth Amendment rights. She cites Brown v. Illinois, 422 U.S. 590 (1975) as support.* However, nothing in Tucker suggests that the rule announced therein depended upon the legality of Tucker's detention. It is, moreover, not necessary to consider the effect of an illegal detention upon the evidence derived from a confession since, at the time Simmons confessed, she was lawfully detained, as set forth above. Furthermore, any Fourth Amendment claim Simmons has as a result of her alleged unlawful detention is barred by the ruling in Stone v. Powell, discussed in Point I, supra.

*Unlike Simmons, Brown was, at the time of his arrest, not even a suspect in the murder for which he was arrested. The sole basis for Brown's arrest was that he had been mentioned as an acquaintance of the decedent.

The circumstances surrounding the apprehension and interrogation of Simmons indicate that both activities were conducted in complete good faith, and in accordance with existing law. It would serve no deterrent purpose to exclude Barbour's testimony, and "may well have the opposite effect of generating disrespect for the law and administration of justice." Stone v. Powell, supra at 3050.

B. The Police Would Have Discovered The Identity Of Peggy Barbour Independently Of Simmons' Statements.

Even if the arrest or interrogation of Simmons amounted to a "primary illegality" which tainted the testimony of Peggy Barbour, "the taint ... is removed if independent investigation would have led to the evidence in question in any event." United States v. Ceccolini, 542 F.2d 136, 140 (2nd Cir. 1976). See also United States v. Falley, 489 F.2d 33, 40-41 (2nd Cir. 1973). There is a good deal of evidence in the record to support the conclusion reached by Justice Davidson that the police would have discovered the identity of Peggy Barbour independently of Simmons' statements.

The day after the murder, Barbour learned that Simmons had been arrested, and that Martin Seiler was dead. Barbour was on her way down to the police station when she was arrested by the detectives. (Exhibit B, p. 22). Whether she was going to the police station to give herself up (she was, in her own mind at least, far less culpable than Barbour) or to visit Simmons makes no difference. The fact is, the police would have learned

her identity.

Second, Nathaniel Simmons had seen Barbour with Simmons when Simmons had arrived home bleeding in the early morning hours of January 13th. He told the police that there had been another woman with Simmons, and he remembered Barbour's face well enough to recognize her picture in the newspaper after the murder (767-68). It is inconceivable that the police would not have interviewed Simmons' female friends and asked Nathaniel to make an identification. There was testimony that Nathaniel was "very cooperative" with the police (297). Thus, the police would have located Barbour through Nathaniel Simmons.*

Third, the taxi driver who took Simmons, Constance and Barbour to Harlem Hospital took Barbour home after dropping off the two sisters (526, 535-36, 685). He surely would have been interviewed, and would have led the police to Barbour's apartment.

Finally, it must be remembered that this was a homicide investigation, conducted by experienced detectives. They believed that Simmons was implicated in the murder. In the normal course of their investigation, they would have interviewed her friends, and determined her whereabouts during the hours preceding the shooting. She had known Peggy Barbour for several

*Constance Simmons was better acquainted with Barbour than was Nathaniel, and might have led the police to her. However, it appears from the record that Constance was not cooperating with the police, and was therefore not as likely as Nathaniel to disclose her identity.

years (1171) and had visited her apartment on three or four occasions (1171-72). They were both lesbians. Many people had seen them together in Barbour's apartment preceding the murder. Barbour was a drug addict who lived with another woman (Portia Brooks) and had a regular job; she was simply not a hard person to locate, given any reasonable lead. The police had several good leads, and would have located Barbour even without Simmons' statements.

C. The Testimony Of Peggy Barbour Was An Independent Act Of Free Will Sufficient To Purge The Alleged Primary Taint.

The test for suppressing the fruits of illegal police activity was set forth in Wong Sun v. U.S., supra at 487-88:

[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to purge the primary taint . . .

The "primary illegality" in the case at bar is the alleged illegal arrest and interrogation of Simmons. It has been argued above that the police would have learned the identity of Barbour wholly apart from Simmons' statements. Nevertheless, even assuming that Barbour would not have been located by independent police investigation, her decision to testify was an "act of free will" of sufficient independence "to purge the primary taint of the unlawful invasion." Wong Sun v. U.S., supra at 486.

Judge (now Chief Justice) Burger said in Smith v. United States, 324 F.2d 879, 881 (D.C. Cir. 1963):

The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance per se, since the individual witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give.

In United States v. Hoffman, 385 F.2d 501, 504 (7th Cir. 1967), the Court refused to suppress testimony of a co-defendant-witness named Fears, whose identity was disclosed by an unlawful arrest:

The testimony of Fears and Moses did not come about by government exploitation of the illegal arrest or of anything incidental thereto. The source of the testimony lies in two much later events the occurrence of which were wholly independent of any fruit of the arrest. First, Fears' decision to plead guilty, and, second, Fears' subsequent determination to testify as a government witness...Fears' voluntary decision to plead guilty was the factor which produced his later testimony against the appellants. And such factor is sufficiently distinguishable to be purged of the primary taint of the illegal arrest. Fears' decision, and the testimony it ultimately prompted, involved the exercise of those attributes of will, perception, memory and volition unique to the individual human personality which serve to distinguish the evidentiary character of a witness from the relative immutability of inanimate evidence.

Similarly, Barbour's testimony did not come about by government "exploitation" of Simmons' statements, since

Simmons' statements were inadmissible against Barbour. The police had evidence against Barbour wholly apart from Simmons' statements. Phyllis Jones had seen Simmons brandishing the loaded gun inside Barbour's apartment in the hours preceding the murder (917-20). Portia Brooks saw Barbour and Simmons leave the apartment together shortly before the murder. Furthermore, Barbour had come to Simmons' apartment immediately after the murder, assisted Constance in hiding the gun, and herself disposed of Seiler's ignition keys. She then proceeded to assist Simmons in obtaining treatment at Harlem Hospital.

The source of Barbour's testimony, like that of Fears' was her own decision to plead guilty and her later decision, made nine months after the arrests, to testify against Simmons. Her decision involved "the exercise of those attributes of will, perception, memory and volition unique to the human personality" which the courts have found sufficient to break the chain of illegality. As Barbour testified at trial:

[I]t was up to me, whether I wanted to take the plea or not, and he [Rosner] left it up to me (551).

Two recent decisions in this Circuit explore the question of when the testimony of a witness, whose identity has been discovered by unlawful means, is sufficiently a product of free will to purge the primary illegality. United States v. Karathanos, 531 F.2d 26 (2nd Cir. 1976). United States v. Ceccolini, 542 F.2d 136 (1976).

In Karathanos, the authorities conducted an unlawful search of Steve's Pier One Restaurant, and found a number of illegal aliens. The aliens were arrested, and the restaurant owners charged with harboring and concealing aliens in violation of federal law.

The Court decided that trial testimony given by the aliens against the restaurant owners was the fruit of the poisonous tree, and that their decision to testify did not fall within the exception for independent intervening acts of free will sufficient to purge the primary taint.

The Court rested its decision on the closeness of the connection between the illegal search and the testimony of the witnesses. The purpose of the search was to seize the illegal aliens. Their testimony was prompted by the leverage which the government possessed to prosecute and deport them or allow them to leave voluntarily. The Court found that a deterrent purpose would be served by excluding the testimony, since "if such reasonably foreseeable fruits of the search were deemed admissible, it might help induce similar future searches without probable cause in the hope that they would uncover aliens who could be similarly prompted to testify." (p. 35).

The same considerations do not apply to the testimony which Barbour gave against Simmons. Unlike the authorities in Karathanos, the police in Simmons were not looking for a specific object at the time they interrogated Simmons. Furthermore,

they did not know that they would discover the identity of a witness over whom they would have leverage. Thus, it would serve no deterrent purpose to prevent the prosecution from using Barbour's testimony.

In United States v. Ceccolini, supra, a police officer, who had entered Ceccolini's flower shop to take a break, went into an area customarily used by employees, and noticed an envelope with cash sticking out. He found it contained betting paraphernalia, and questioned Miss Hennessy, one of Ceccolini's employees. She told the officer that Ceccolini had told her to give the envelope to someone. At a Grand Jury appearance, Ceccolini denied taking bets; his testimony was contradicted by Miss Hennessy, who testified against him at a subsequent perjury trial. The principal question before Judge Gagliardi was whether the government would have discovered Miss Hennessy through independent investigation. The question of whether Miss Hennessy's testimony was an independent act of free will, sufficient to attenuate the primary taint, was not pressed at trial. Ceccolini, supra at 142. In this posture, the Court refused to find that Judge Gagliardi's suppression of her testimony was clearly erroneous merely because the evidence suggested she had not been coerced into testifying.

Neither Karathanos nor Ceccolini holds that a witness' testimony must be suppressed as the "fruit of the poisonous tree" merely because the government possessed some sort of leverage

over the witness. The question is still whether the government has come at the testimony by exploiting the primary illegality. Such is not the case with the testimony of Peggy Barbour.

The primary purpose of the exclusionary rule is to deter police misconduct. It has already been established that the police did not act unlawfully when they arrested Simmons and questioned her at the stationhouse. Therefore, it would serve no deterrent purpose to exclude the testimony of Peggy Barbour, particularly in the context of a habeas corpus proceeding brought ten years after the relevant events.

Conclusion

For the reasons set forth above, the decision of the District Court should be affirmed and the petition for habeas corpus denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

PETER L. ZIMROTH
DAVID RAPAPORT
Assistant District Attorneys
Of Counsel

January 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

United States ex rel
Theresa Simmons,

:

Petitioner-Appellant, :

-against-

:

No. 76-2117

FRANCES CLEMENTE, Superintendent,
Bedford Hills Correctional Facility,
Bedford Hills, N. Y.

:

:

-----X

PROOF OF SERVICE

I, David Rapaport, hereby certify that I have served a copy of the Brief of Appellee on Harry I. Subin, Esq., attorney for the appellant, by mailing a copy to him, postage prepaid, at New York University School of Law, 40 Washington Square South, New York, New York 10012, this 14th day of January, 1977.



David Rapaport
Assistant District Attorney